June 17, 2005

Mr. Scott Matthews
Acting Executive Director
California Energy Commission
1516 Ninth Street
Sacramento, CA 95814

Re: Appeal of San Diego Gas & Electric Company Regarding
California Energy Commission's Aggregation Proposals; Docket No. 04-IEP-1D

Dear Mr. Matthews:

San Diego Gas & Electric Company (SDG&E) is in receipt of your letter dated June 3, 2005 regarding the California Energy Commission (CEC) Staff Proposal for aggregating and releasing confidential data that has been provided to you by SDG&E in the Integrated Energy Policy Report (IEPR) Proceeding.[1/] As set forth in the Notice of Intent attached to your letter, CEC staff intends to present aggregations of the utilities'[2/] confidential resource planning data in the CEC's 2005 Energy Reports in this proceeding. While your letter recognizes the need to protect certain confidential information, you also note that the CEC is hoping to provide the public with an adequate opportunity to review and discuss information in the CEC's reports, which will also be transmitted to the California Public Utilities Commission (CPUC). SDG&E concurs with that objective and believes that this goal can be achieved without releasing certain categories of confidential information discussed herein. For the most part, the CEC has achieved the proper balance in its proposed aggregations for this data. Nevertheless, for the reasons discussed below, SDG&E is compelled to appeal several aspects of the CEC's aggregation proposals.

To briefly summarize, SDG&E understands the CEC's aggregation proposals to essentially provide for release of information under 12 possible scenarios: (1) annual capacity, (2) annual energy, (3) quarterly capacity, and (4) quarterly energy for (1) utility specific information, (2) planning area data, and (3) utility data showing high and low ranges. In addition, SDG&E understands that none of this data would be released for the years 2006 – 2009. Of these 12 categories of data, SDG&E appeals only three: annual capacity data at the utility specific level, quarterly capacity data at the utility specific level, and quarterly capacity planning area data.

1/ Along with Southern California Edison (SCE) and Pacific Gas and Electric Company (PG&E), SDG&E also submitted on May 20, 2005 an aggregation proposal for the confidential data. SDG&E incorporates those Comments by reference herein.

2/ SDG&E, SCE, and PG&E.

A. The CEC's Aggregation Proposals Do Not Require Public Disclosure of Confidential Data to Transmit Findings and Conclusions to the CPUC, Nor Should the CEC Treat ESP and IOU Data Differently.

For the three disputed scenarios, SDG&E does not believe that the CEC's aggregation proposals are justified under the standards that should apply to the utilities' confidential information in this proceeding. First, contrary to the implication in your letter at page 2, the utilities' confidential resource planning information can be provided to the CPUC staff without disclosing that data to market participants. In fact, that is precisely how the CPUC's resource planning information has been conducted up until this point. CPUC staff received all confidential information pursuant to Section 583 of the Public Utilities Code and other protections, and non-market participants received that same data pursuant to non-disclosure agreements. This approach has worked smoothly and successfully at the CPUC and the same procedures can apply here. As such, to the extent your letter suggests that the data in the report must be public for purposes of transmitting the CEC's findings and conclusions to the CPUC, that justification is flawed.

Second, the CEC aggregation proposal would provide utilities and other LSEs with different levels of confidential data disclosure. The staff proposal indicates that it plans to apply its aggregation and release proposal only to utility data, not to ESP data.[3/] Among the purported justifications for this differing treatment, the CEC explains that ESPs compete with each other but not with the IOUs because of the current suspension of direct access. This explanation is simplistic and unjustified. In particular, it is well known that aggregation and other departing load potential exists even if direct access is not presently available to new customers (and reinstatement of direct access is a very real possibility as well). Indeed, the CEC has requested that the utilities present resource scenarios that show varying degrees of future departing load. As such, SDG&E can discern no sound public policy basis for this differing treatment and certainly not on the grounds that the utilities and ESPs do not potentially serve the same load. SDG&E recommends that the data be treated for purposes of release in an equivalent manner for both ESPs and IOUs.

B. Applicable Law as well as the CPUC's and CEC's Joint Agency Processes Do Not Require Disclosure of the Confidential Data Disputed Herein.

The primary reason SDG&E opposes release of the data indicated above is that to do so would disclose SDG&E's most market sensitive information, its residual net short needs, thereby allowing potential suppliers to understand SDG&E's forecasted positions and, as such, the specific levels for which SDG&E procures resources. It is therefore critical that the CEC protect this information to ensure that ratepayer interests are not

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[3/] Staff Proposal, p. 5.

compromised. According to the CEC aggregation proposal, as long as monthly or hourly data is not released, then that standard is ostensibly met. This reasoning is flawed because to the extent SDG&E purchases commodity on a quarterly and annual basis, revealing SDG&E's quarterly and annual capacity procurement needs threatens SDG&E's ability to achieve the best possible outcomes for customers in negotiating supply arrangements. This concern exists at both the utility and planning area levels (for the quarterly data) because of the clear description of SDG&E's residual net short needs revealed in the proposed charts. Also, merely protecting the first three years of data is inadequate to address this concern because with 5-year short-term procurement authority that was granted in the last resource planning decision, transactions at the quarterly and annual levels may be more prevalent in the future. Thus, this information will become even more valuable.

Furthermore, while the CEC claims that the CPUC recently ordered that the utilities release quarterly data,[4/] that directive does not relate to the same type of quarterly (and annual) capacity data the CEC would release here.[5/] The CEC also disregards findings in that ruling that support the utilities' efforts to protect their sensitive residual net short information. The CPUC demonstrates in that ruling, for example, that it is concerned about the *risk* of harm to ratepayers that results from disclosure of competitively sensitive market information: "Our goal in resolving the remaining discovery disputes is to make available to the parties sufficient data from which utility avoided costs may be derived, *without subjecting utility ratepayers to the risk of market manipulation stemming from misuse of market-sensitive data."*[6/] That ruling further states that "[t]his information should not be subject to disclosure because *the risk* to the ratepayers of releasing data delineating the utility's RNS positions outweighs the public interest in making this data available to market participants …."[7/] The CEC is far more willing to expose ratepayers to a risk of harm that might occur from higher energy prices if suppliers have an undue negotiating advantage through access to the utilities' confidential bundled customer load and resource information.

SDG&E also disagrees with the CEC's claim that it is not bound by the CPUC's determinations regarding the confidentiality of this data.[8/] The CPUC's Assigned Commissioner Ruling issued on March 14, 2005 clearly indicates that the intent of this joint agency action is for the CPUC to be able to rely upon the CEC's findings and conclusions in this proceeding to the greatest extent possible. That March 14 Ruling also attempts to establish common procedures relating to preparation of the IEPR reports and

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4/ CPUC Ruling in R.04-04-025, dated May 9, 2005.

5/ SDG&E supports, however, a process similar to the CPUC's such as TURN has proposed in a recent letter to the CEC and CPUC to allow non-market participants such as TURN to get the utilities' confidential data.

6/ Id. at 12.

7/ Id. at 14.

8/ Staff Proposal, p. 5.

intervenor compensation for this proceeding as examples of this desired coordination. There is no factual or legal justification for the CEC's attempts here to carve out confidential material for differing treatment between the two agencies when coordination and consistency are the stated goals. While the CEC may disagree as a matter of policy with the CPUC's determinations regarding confidentiality,[9/] such a belief is insufficient to trump the interests of ratepayers that the CPUC has consistently sought to protect from the potential harm that might result from unwarranted disclosure of confidential material relating to bundled customer needs. Furthermore, if the CEC wishes to formally challenge the CPUC's approach to confidentiality, then it should do so in the formal rulemaking soon to be convened at the CPUC. For the CEC to unilaterally ignore, however, confidentiality protections the CPUC has consistently granted in the interests of ratepayers without first conducting a thorough factual and legal investigation where all affected interests can participate will lead to, at a minimum, inconsistent and confusing policy.

Moreover, under the CEC's own regulations, as well as pursuant to California law and prior determinations by the CPUC, the disputed data qualifies for confidential treatment. SDG&E has detailed those arguments in its Confidentiality Applications made on March 1, 2005 and April 1, 2005 in this proceeding, and SDG&E incorporates those filings by reference herein. Public Resources Code Section 2505 describes the information that must be provided to the CEC to receive a confidential designation. Among those provisions, Section 2505(a)(1)(d) requires the Applicant to cite and discuss the Public Records Act or other law(s) that allow the CEC to keep the record confidential. The arguments SDG&E made in this regard in its March 1 and April 1 filings continue to be valid. Neither your letter nor the staff proposal adequately distinguish the disputed data herein from otherwise being entitled to protection as a trade secret: "any formula, pattern, device or compilation of information which is used in one's business, and which gives [him or her] an opportunity to obtain an advantage over competitors who do not know or use it …" (see March 3 Letter to SDG&E, p. 1; quoting *Uribe v. Howie* (1971) 19 Cal. App. 3d 194, 207-208).[10/] Any conclusion that the data SDG&E seeks to protect here is not a trade secret must be rejected.

In any event, even if the trade secret standard were not satisfied, the Public Records Act (PRA) also protects data from disclosure when "the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record" (Government Code Section 6255(a)). SDG&E's previous Applications have explained in more than sufficient detail why ratepayers – those same ratepayers whose interests the CEC should also protect – may be harmed in the form of higher energy

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9/ Id.

10/ The California Public Records Act allows for non-disclosure of trade secrets at Government Code Section 6254(k), which refers to protecting Evidence Code Privileges. The trade secret privilege is memorialized in Evidence Code Section 1060.

prices if this commercially sensitive data were available to suppliers. The CPUC has also recently referred to the PRA as grounds to withhold data from public disclosure where "the public interest is better served by nondisclosure."[11/] While the CEC continues to push for more disclosure of this data, it provides no evidence to support its conclusion that such release advances the public interest rather than harms it. SDG&E continues to be perplexed and concerned that the CEC would tolerate exposing ratepayers to the risk of higher prices when that approach conflicts with the CPUC's. At a minimum, SDG&E urges the CEC and CPUC to act consistently regarding confidentiality, and so far that alignment and coordination are severely lacking.

Finally, the CEC makes no mention of Section 454.5 of the Public Utilities Code that requires the CPUC to maintain as confidential market sensitive information related to a distribution utility's procurement plan. The information at issue in this appeal falls squarely within the scope of this statute, and it should be protected at the CEC as well. As noted above, because this year's IEPR process is essentially being co-managed with the CPUC's procurement planning process,[12/] it is incumbent upon the CEC to treat the market sensitive procurement data on the same level as would the CPUC. Because the CPUC has in fact concluded that its intervenor compensation rules would apply to the CEC's IEPR process,[13/] it is only fair and logical that the CPUC's requirements for confidentiality also be honored here at the CEC. Moreover, in discussing the obligations imposed under Section 454.5, the CPUC explained in its last resource planning decision the importance of maintaining the protections required under Section 454.5:

> Currently under … Section 454.5 to the Pub. Util. Code, the Commission is to have in place ***procedures that ensure the confidentiality of any market sensitive information submitted by an IOU as part of its proposed procurement plan***, while ORA and other consumer groups that are not market participants (NMP) have access to the information under confidentiality provisions. This provision of ***AB 57 was an attempt to balance the compelling ratepayer interest in ensuring that certain legitimately confidential information is kept out of the hands of those who can use it to manipulate wholesale energy markets***, with promoting a sufficiently transparent decision-making process to allow for scrutiny and review by the legislature and the public.[14/]

In short, the CEC aggregation proposal does not justify release of the three categories of data described above. Not only should this material be protected under the trade secret privilege and the public interest balancing test of the Public Records Act, it is

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11/ See Assigned Commissioner Ruling dated March 14, 2005, p. 7.
12/ See Assigned Commissioner Ruling dated September 16, 2004; D.04-12-048, pp. 165-167.
13/ See Assigned Commissioner Ruling dated March 14, 2005, pp. 8-12.
14/ D.04-12-048, p. 177, emphasis added.

also market sensitive under Section 454.5 of the Public Utilities Code. SDG&E respectfully urges the Commission to ensure that the categories of data discussed herein should indeed be treated consistent with SDG&E's limited and narrowly tailored confidentiality request.

Respectfully submitted,

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San Diego Gas & Electric Company

cc: Caryn Holmes, Energy Report Committee Counsel
Kevin Kennedy, Energy Report Project Manager